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## 1 UNITED STATES DISTRICT COURT

## 2 SOUTHERN DISTRICT OF TEXAS

3 — — —

4 THE HONORABLE ANDREW S. HANEN, JUDGE PRESIDING

5 STATE OF TEXAS, ET AL, No. 1:18-CV-00068

6 Plaintiff,

7 vs.

8 UNITED STATES OF AMERICA,  
9 ET AL,

10 Defendant.

## 11 STATUS CONFERENCE HEARING

## 12 OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 Houston, Texas

14 TUESDAY, MARCH 30, 2021

## 15 APPEARANCES:

16 For the Plaintiff: WILLIAM T. THOMPSON, Assistant  
17 Attorney General18 PATRICK K. SWEETEN, Assistant  
19 Attorney General20 For the Defendant, JEFFREY S. ROBINS, Deputy  
21 Defendant- Director

22 Intervenor, and

23 Federal

24 Defendants:

25 DANIEL D. HU, Chief

NINA PERALES, MALDEF

MAYUR SAXENA, Assistant Attorney  
GeneralDOUGLAS HALLWARD-DREMEIER,  
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7 Proceedings recorded by mechanical stenography.  
8 Transcript produced by Reporter on computer.  
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## PROCEEDINGS

(The following proceedings held in open court.)

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**TUESDAY, MARCH 30, 2021 -- 11:09 A.M.**

**--o0o--**

THE COURT: Okay. We're here in 18-CV-68, State of Texas versus United States of America. I thank ya'll for being here. Originally requested hearing by Intervenor -- kind of status conference is how I think they described it. I won't say I had ignored the request, but since the basis of it was just a presidential statement, I didn't see that that added anything to the picture.

You can tell from my order that set this though, once the House had actually passed a bill -- again, we all know that and, you know, \$0.50 might find you a free cup of coffee somewhere, but there did seem some movement, so it did seem like there was a need to get together.

We have some new faces. Let me start my right to the left. Mr. Hu, you are here representing the United States. Who is your co-counsel?

MR. HU: Mr. Jeff Robins, Your Honor.

11:11:19 1 THE COURT: All right.

11:11:20 2 Ms. Perales, you are here  
11:11:22 3 representing the Intervenor?

11:11:24 4 MS. PERALES: Yes, thank you, Your  
11:11:26 5 Honor. Also joined by Samantha Uribe (phonetic),  
11:11:30 6 also of my office.

11:11:31 7 THE COURT: Okay.

11:11:38 8 MR. HALLWARD-DREMEIER: Douglas  
11:11:42 9 Hallward-Dremeier from Ropes & Gray, Your Honor.  
11:11:42 10 Also for the Defendant/Intervenor.

11:11:44 11 THE COURT: Hello.

11:11:44 12 MR. SAXENA: Good morning. Mayur  
11:11:47 13 Saxena from the State of New Jersey.

11:11:50 14 THE COURT: Great. And new people  
11:11:52 15 representing the State of Texas.

11:11:55 16 MR. SWEETEN: Yes, Your Honor. As you  
11:11:57 17 know, Mr. Disher left the office to go into private  
11:12:00 18 practice and we now have Will Thompson who is Deputy  
11:12:04 19 Chief, and also co-counsel.

11:12:06 20 THE COURT: All right. Great. I'm  
11:12:07 21 going to -- you can leave your mask on or take it  
11:12:11 22 off. We're going to speak from our seats. Make  
11:12:17 23 sure you have a microphone whether you have the mask  
11:12:19 24 on or off.

11:12:22 25 I scheduled this later than I

11:12:27 1 normally would schedule, like a nine o'clock  
11:12:30 2 hearing. But I wanted to give the folks from New  
11:12:32 3 Jersey a chance to fly down and back in one day if  
11:12:35 4 they so chose. I wanted to give everybody else a  
11:12:39 5 chance to get some sleep after they watched both  
11:12:44 6 Baylor games last night. Our Bears did okay, but  
11:12:52 7 our lady Bears fell a basket short.

11:12:55 8                   Anyway, Ms. Perales, do you want to  
11:13:00 9 lead off or -- it's kind of your party.

11:13:04 10                   MS. PERALES: Thank you, Your Honor.  
11:13:07 11 The Court's order today asked -- or made specific  
11:13:11 12 reference to the passage of the Dream and Promise  
11:13:14 13 Act in the U.S. House of Representatives.

11:13:16 14                   THE COURT: Let me interrupt you with  
11:13:18 15 that, though. I don't want to limit to that. If  
11:13:20 16 there's more information out there, I want to hear  
11:13:23 17 it all.

11:13:23 18                   MS. PERALES: Thank you, Your Honor. I  
11:13:24 19 thought I would start there and mention that the  
11:13:26 20 Dream and Promise Act passed U.S. House of  
11:13:30 21 Representatives on March 18th and is currently  
11:13:32 22 pending in the Senate.

11:13:35 23                   We wanted to also draw the Court's  
11:13:37 24 attention to a second bill called the Dream Act. It  
11:13:41 25 is in the Senate. It is a Senate bill, as opposed

11:13:43 1 to a House bill, and it is cosponsored by Senator  
11:13:50 2 Durbin and Lindsey Graham.

11:13:50 3 Both of those bills are similar in  
11:13:53 4 the way that they offer a conditional residency to  
11:13:56 5 young persons who came to the United States as  
11:14:00 6 children. The details are a little bit different,  
11:14:04 7 but they are very similar.

11:14:06 8 THE COURT: Is the Senate version as  
11:14:11 9 broad as the American Dream and Promise act?

11:14:16 10 MS. PERALES: I'm looking at my friend  
11:14:17 11 from New Jersey, who has been studying both of those  
11:14:20 12 bills. I think there are differences on the margin,  
11:14:23 13 Your Honor, but with respect to the Dreamer  
11:14:27 14 population -- as opposed to TPS and some of those  
11:14:29 15 other ones -- I believe they're fairly similar.

11:14:32 16 THE COURT: Okay. Well, the reason I  
11:14:34 17 ask, of course, Ms. Perales, is no secret. You know  
11:14:38 18 the lawsuit's constants have been you and me -- and  
11:14:46 19 Mr. Hu, I'm sorry -- but we've talked about other  
11:14:56 20 attempts by Congress to legalize the DACA  
11:15:02 21 recipients.

11:15:03 22 It's been argued to me, and with  
11:15:05 23 some justification, that one of the reasons it  
11:15:08 24 hasn't passed already is because it was always  
11:15:11 25 joined with something else that one side or the

11:15:17 1 other found objectionable.

11:15:21 2 The House act seemed to -- while it  
11:15:24 3 covered -- seemed to me it covered the DACA  
11:15:28 4 recipients, it was broader than that and picked up a  
11:15:31 5 lot more people. That's why I was asking about the  
11:15:33 6 Senate bill, if it was narrower.

11:15:38 7 MS. PERALES: I don't know the answer  
11:15:40 8 to that question, Your Honor.

11:15:40 9 THE COURT: Okay.

11:15:41 10 MS. PERALES: But I would -- I would be  
11:15:43 11 happy to file a very short one-page advisory --

11:15:46 12 THE COURT: Oh, I can -- I can -- I'll  
11:15:47 13 find it. You don't have to do that.

11:15:49 14 MS. PERALES: Thank you, Your Honor.  
11:15:51 15 There is quite a bit of energy around both of these  
11:15:55 16 bills. There is hope that they will both receive  
11:16:00 17 hearings in the Senate, and there's been quite a bit  
11:16:04 18 of discussion about how to get to passage in the  
11:16:06 19 Senate that the Court will see in the news  
11:16:08 20 everything from, you know, bipartisan support to the  
11:16:13 21 Dreamer population, to possibly -- this is all  
11:16:17 22 public information -- having this one or both of  
11:16:20 23 these bills be incorporated into the next COVID  
11:16:25 24 relief package, and/or passed under rules governing  
11:16:29 25 reconciliation, as opposed to a 60-vote super

11:16:33 1 majority.

11:16:33 2 So there's quite a bit of energy,  
11:16:36 3 quite a bit of action going around these bills. And  
11:16:40 4 then of course Your Honor has seen the filing by  
11:16:42 5 Federal Defendants with respect to rulemaking.

11:16:44 6 I won't speak more about that,  
11:16:46 7 because that is for them to say, but I did just want  
11:16:49 8 to touch back on a couple of things in this case,  
11:16:52 9 which is that the Court in its preliminary  
11:16:54 10 injunction decision mentioned the Court's belief at  
11:16:58 11 that time that other branches were responsible for  
11:17:02 12 any new DACA-type policy.

11:17:07 13 The Supreme Court, in a sense,  
11:17:09 14 echoed the Court's position when it said at least at  
11:17:14 15 the outset that changes to DACA lie with the agency,  
11:17:19 16 or in this case Federal Defendants.

11:17:21 17 Given that DACA is evolving, we  
11:17:25 18 believe that it would be appropriate for the Court  
11:17:28 19 to stay its hand for at least awhile and not issue a  
11:17:33 20 decision on the 2012 DACA memo, which if it is not  
11:17:40 21 already moot will be moot soon.

11:17:42 22 THE COURT: Okay.

11:17:43 23 MS. PERALES: Thank you.

11:17:43 24 THE COURT: Mr. Saxena, you want to  
11:17:45 25 weigh in?



11:17:49 1 MR. SAXENA: Thank you, Your Honor.  
11:17:52 2 Just for -- with regard to the two bills that you  
11:17:56 3 mentioned, it is correct that they're comparable.  
11:18:01 4 But H.R.6 is slightly more protective at the  
11:18:05 5 margins.

11:18:06 6 For example: The period of  
11:18:08 7 continuous presence under H.R.6 begins in 2021,  
11:18:14 8 whereas the period of continuous presence in the  
11:18:17 9 Senate bill begins in 2017. So there are  
11:18:21 10 differences. They're not entirely comparable.

11:18:24 11 For New Jersey's part, I would say  
11:18:29 12 we are in agreement and that we are happy that the  
11:18:33 13 coordinate branches are moving forward with the  
11:18:37 14 processes, both at the Secretary of Homeland  
11:18:39 15 Security level, and also potentially the  
11:18:44 16 Legislature. And we believe that the -- this type  
11:18:47 17 of movement is -- is what is what people have been  
11:18:56 18 waiting to happen.

11:18:58 19 THE COURT: Mr. Robins, you want to  
11:18:59 20 bring me up to date of what's going on from the  
11:19:04 21 Fed's side?

11:19:06 22 MR. ROBINS: Thank you, Your Honor.  
11:19:07 23 Should I find myself a microphone?

11:19:08 24 THE COURT: I think you are loud enough  
11:19:10 25 right there, if you don't mind yelling.

11:19:13 1 MR. ROBINS: No problem, Your Honor.  
11:19:14 2 At the outset, the Federal Defendants respectfully  
11:19:18 3 agree with the Defendant-Intervenors and suggest the  
11:19:21 4 best course of action, at this point, would be for  
11:19:25 5 the Court to defer a ruling on the lawfulness of  
11:19:27 6 DACA for a period of time in light of both the  
11:19:29 7 pending legislation and the Department of Homeland  
11:19:34 8 Security's rulemaking efforts.

11:19:35 9 With regard to the Dream Act --  
11:19:39 10 specifically if enacted -- there likely would be no  
11:19:40 11 need for this Court to pass on the legality of DACA.

11:19:46 12 Current DACA recipients would be  
11:19:47 13 eligible to obtain relief under the new legislation,  
11:19:50 14 and most likely moot this case.

11:19:53 15 Federal Defendants also note that  
11:19:54 16 none of the legal objections raised to DACA by the  
11:19:57 17 Plaintiffs would apply to legislative action taken  
11:20:00 18 subsequently by Congress. And an order potentially  
11:20:04 19 finding DACA was either substantively or  
11:20:07 20 procedurally unlawful would not alter the benefits  
11:20:10 21 potentially inferred by subsequent legislation.

11:20:14 22 The additional point that Federal  
11:20:18 23 Defendants have with regard to the Dream Act in  
11:20:20 24 response to the Court's order has to do with the  
11:20:22 25 disruptive effects of a potential injunction if not

11:20:26 1 stayed by this Court that that could have on DACA  
11:20:30 2 recipients, and also as a Supreme Court recognized  
11:20:34 3 other interests and equities that rely on DACA  
11:20:38 4 recipients in -- as employment in various fields.

11:20:46 5 And so, Federal Defendants know  
11:20:48 6 that -- injunction absence to stay, that those  
11:20:50 7 recipients -- that the current DACA recipients would  
11:20:54 8 lose their DACA, work authorization, and pending  
11:20:57 9 eligibility for adjustment of status if the Dream  
11:20:59 10 Act becomes law. And those are important factors  
11:21:03 11 for the Court to consider.

11:21:04 12 Next I'll turn to the anticipated  
11:21:07 13 rulemaking, Your Honor, which Federal Defendants  
11:21:12 14 also note -- we believe counsels the Court not to  
11:21:15 15 act. And so, on Friday the Department of Homeland  
11:21:18 16 Security announced it intends to issue a notice of  
11:21:22 17 rulemaking that would solicit comments on a DACA  
11:21:25 18 regulation.

11:21:26 19 That regulation would directly  
11:21:29 20 address procedural concerns raised by the Court and  
11:21:33 21 by Plaintiffs creating DACA guidance, and would  
11:21:37 22 carefully address the substantive questions that  
11:21:39 23 have been raised.

11:21:40 24 At a minimum, that rulemaking, Your  
11:21:43 25 Honor, would change the legal landscape.

11:21:50 1 THE COURT: When is that going to  
11:21:51 2 happen? I mean, I'm going to turn next to Texas.  
11:21:54 3 That's -- I mean, I can't really put words in  
11:21:59 4 Mr. Thompson's mouth and Mr. Sweeten's mouth, but I  
11:22:02 5 never hesitated to put words in Mr. Disher's mouth,  
11:22:08 6 but I anticipate them saying, "Judge, we've been  
11:22:11 7 waiting x-number of years."

11:22:14 8 So when do you expect the DHS to do  
11:22:16 9 something?

11:22:18 10 MR. ROBINS: Your Honor, the timing of  
11:22:20 11 that is uncertain, but the Department of Homeland  
11:22:22 12 Security has authorized me to target that its  
11:22:24 13 targeted publication of the rule would occur within  
11:22:28 14 four to six months.

11:22:30 15 There are many factors that come  
11:22:33 16 into play in meeting that target and ability to do  
11:22:35 17 that, including the number of comments that come in  
11:22:40 18 due consideration of those comments. But the  
11:22:42 19 Federal Defendants would note that in light of the  
11:22:46 20 delay and the challenge to the 2012 DACA by the  
11:22:51 21 State of Texas, the time that's passed sense that's  
11:22:55 22 gone into effect that those factors stack up in  
11:22:58 23 allowing an additional brief pause or respite before  
11:23:03 24 ruling on the question of legality.

11:23:04 25 THE COURT: All right. Do you have any

11:23:05 1 field -- I know I'm asking you to step into the  
11:23:08 2 shoes of another branch -- but is there any feel  
11:23:14 3 from the Justice Department to either of the two  
11:23:18 4 acts Ms. Perales told us about?

11:23:23 5 MR. ROBINS: No, Your Honor. I don't  
11:23:24 6 have a feel. The Administration has indicated its  
11:23:28 7 support for the Dream Act and unfortunately I have  
11:23:33 8 no greater understanding or reading for the Court  
11:23:39 9 today.

11:23:39 10 THE COURT: All right. Thank you,  
11:23:43 11 Mr. Robins.

11:23:44 12 MR. ROBINS: Thank you, Your Honor.

11:23:44 13 THE COURT: Mr. Thompson, you and  
11:23:46 14 Mr. Sweeten want to...

11:23:49 15 MR. THOMPSON: Thanks very much, Your  
11:23:50 16 Honor. Will Thompson for the State of Texas. If I  
11:23:53 17 may, I'll first address the bill, and then I'll go  
11:23:55 18 to the -- on the bill I guess I do have a feeling of  
11:24:01 19 whether it's going to pass the Senate and I don't  
11:24:03 20 think it is. It's subject to the 60-vote threshold,  
11:24:07 21 both because I think we anticipate someone will  
11:24:10 22 filibuster it, but also because even if they don't  
11:24:13 23 there's actually a point of order regarding Senate  
11:24:14 24 rules.

11:24:15 25 I know this is kind of deep in the

11:24:16 1 weeds, but in 8 USC 1254(a), Paragraph H, in the  
11:24:21 2 Code it actually creates a Senate rule that says it  
11:24:24 3 is not within the order of the Senate to consider on  
11:24:27 4 the floor a bill that would turn TPS aliens into  
11:24:31 5 lawful permanent residents. It provides the way to  
11:24:35 6 get over that is a 60-vote threshold.

11:24:39 7 So there's a 60-vote threshold for  
11:24:41 8 filibusters. There's this independent reason of the  
11:24:44 9 60-vote threshold for this bill. So it hasn't  
11:24:46 10 passed. I don't think we should hold our breath on  
11:24:49 11 waiting for it to pass.

11:24:52 12 With regard to Senator Durbin's  
11:24:55 13 bill, I'll just note that Senator Durbin has  
11:24:57 14 introduced substantially similar bills every year  
11:25:00 15 and not one of them has passed.

11:25:02 16 We just don't -- there's no way  
11:25:04 17 that can we expect any kind of timely action with  
11:25:07 18 any kind of certainty -- I don't think. With regard  
11:25:10 19 to the Federal Government's notice of a potential  
11:25:13 20 future notice of proposed rulemaking, it sounds like  
11:25:17 21 it's potentially four to six months away.

11:25:19 22 I take it after that there will be  
11:25:22 23 notice of comment. We don't know what will happen  
11:25:24 24 with that. And certainly my friends on the other  
11:25:27 25 side can't promise that the final rule will even

11:25:30 1 ever go into effect or what it will say. Because  
11:25:32 2 that would be contrary to the APA's requirement that  
11:25:35 3 they thoughtfully considered the has-yet-to-happen  
11:25:38 4 comments.

11:25:38 5 But just -- we can imagine  
11:25:40 6 hypothetically for the sake of argument that if  
11:25:43 7 either one of these things happened what would be  
11:25:45 8 the effect. Well, with regard to the bill it  
11:25:47 9 absolutely would not moot our challenge to DACA.

11:25:49 10 THE COURT: Okay. Why is that?

11:25:51 11 MR. THOMPSON: Couple of reasons, Your  
11:25:53 12 Honor. One could imagine a bill that says, "There's  
11:25:57 13 an existing DACA program created by executive  
11:26:00 14 action, we hereby bless and ratify it."

11:26:05 15 That's not what this bill does. It  
11:26:06 16 creates a separate program for separate eligibility  
11:26:09 17 requirements.

11:26:09 18 There's some overlap, of course,  
11:26:11 19 but the eligibility requirements are not a complete  
11:26:14 20 overlap. So there will be people who are eligible  
11:26:15 21 for DACA who would not able to proceed under this  
11:26:17 22 bill, and vice versa.

11:26:19 23 THE COURT: Really? Give me an  
11:26:21 24 example?

11:26:21 25 MR. THOMPSON: Sure. One example has

11:26:22 1 to do with the persecution requirement. 2012 DACA  
11:26:26 2 notes -- there's nothing about persecution in there.  
11:26:29 3 In the bill, one of the requirements is that people  
11:26:31 4 applying not having previously committed acts of  
11:26:33 5 persecution.

11:26:35 6 The timing is also different. So  
11:26:37 7 the document was tied to having been in United  
11:26:39 8 States at the time --

11:26:40 9 THE COURT: Wasn't the timing broad  
11:26:42 10 enough that it would sweep up all the DACA people?  
11:26:45 11 That's the way I read it.

11:26:48 12 MR. THOMPSON: I don't think it would,  
11:26:49 13 Your Honor. It obviously depends on what sorts of  
11:26:52 14 people exist out there in the world, but given the  
11:26:55 15 large numbers it's not a complete overlap.

11:26:57 16 THE COURT: Okay.

11:26:58 17 MR. THOMPSON: Right. Different people  
11:27:00 18 and it creates a different program. So it's not --  
11:27:03 19 the law -- if it became a law -- would not just say,  
11:27:07 20 "You get all of the DACA benefits."

11:27:09 21 It actually would turn them into  
11:27:11 22 lawful permanent residents -- or conditional, lawful  
11:27:14 23 permanent residents. So different people.  
11:27:16 24 Different benefits. Not yet -- essentially never a  
11:27:19 25 law.



11:27:21 1 With regard to the potential  
11:27:23 2 executive action from DHS, my friend on the other  
11:27:27 3 side who was very careful in his wording said it  
11:27:30 4 would address the procedural objections.

11:27:32 5 It might or might not. Obviously  
11:27:34 6 depends on what they do. There might be a whole new  
11:27:37 7 host of procedural objections, depending on how the  
11:27:40 8 agency proceeds. But what he didn't say was that it  
11:27:42 9 would affect the substantive objections, because it  
11:27:44 10 wouldn't.

11:27:45 11 Your Honor has previously ruled in  
11:27:47 12 the PI order that this is not an ambiguous statutory  
11:27:51 13 situation that is subject to *Chevron* deference. So  
11:27:54 14 there's nothing they can do through agency action  
11:27:58 15 like rulemaking that affects the unlawfulness of the  
11:28:02 16 program. Unless Your Honor has --

11:28:04 17 THE COURT: Let me ask you a different  
11:28:05 18 question while I have you. Let's assume I decide  
11:28:11 19 that I -- I'm not going to wait because I think  
11:28:19 20 we've counted up to -- I think we got up to 30  
11:28:23 21 different bills that have been introduced and not  
11:28:27 22 passed. Still waiting for that may be like waiting  
11:28:34 23 for -- but what would remedy -- let's say I rule and  
11:28:41 24 I rule in your favor, what's the remedy?

11:28:46 25 MR. THOMPSON: I think the standard

11:28:47 1 remedy under §706 of the APA is Vacatur, so the  
11:28:52 2 statutory language is hold unlawful and set aside.  
11:28:54 3 That's been interpreted to mean vacate the  
11:28:59 4 underlying agency action. In this case, the memo.

11:29:02 5 THE COURT: Well, doesn't that, in a  
11:29:06 6 way, play into what Mr. Robins was suggesting is --  
11:29:12 7 you are suggesting I vacate it and send it back.

11:29:16 8 Wouldn't that be what they're doing  
11:29:18 9 anyway?

11:29:20 10 MR. THOMPSON: No, Your Honor. Because  
11:29:22 11 what they're doing now --

11:29:23 12 THE COURT: We don't know what they're  
11:29:25 13 doing.

11:29:25 14 MR. THOMPSON: Right.

11:29:26 15 THE COURT: Exactly, but isn't that  
11:29:28 16 what they anticipate doing?

11:29:30 17 MR. THOMPSON: I think the difference  
11:29:31 18 is whether the 2012 memo remains in effect during  
11:29:35 19 that period or not. In addition, it's always  
11:29:40 20 difficult to play this game, but I suspect that  
11:29:43 21 given the failure to pass and take serious action on  
11:29:46 22 DACA issues with the 2012 memo in place, perhaps the  
11:29:51 23 2012 memo being out of the picture will provide  
11:29:55 24 sufficient clarity, and the motivation for people to  
11:29:57 25 act and, you know, political branches to take more

11:30:01 1 responsibility on this issue.

11:30:02 2 THE COURT: Okay. I assume it's  
11:30:03 3 ya'll's position that I should go ahead and rule?

11:30:09 4 MR. THOMPSON: Yes, Your Honor. And  
11:30:10 5 we're heartily grateful to see that line in Your  
11:30:12 6 Honor's order about not delaying any court action.

11:30:19 7 THE COURT: All right. Okay. Thank  
11:30:21 8 you.

11:30:21 9 Ms. Perales, you or Mr. Saxena --  
11:30:29 10 you know, as you know from the order that I wrote  
11:30:31 11 that I am working on this. I mean, what -- if you  
11:30:38 12 could convince me otherwise, what time period would  
11:30:40 13 you argue that I should wait?

11:30:49 14 MS. PERALES: Your Honor, I have a lot  
11:30:54 15 to say based on what Texas just said. But to  
11:30:56 16 address the Court's question, I think the point is  
11:30:59 17 well taken that Texas delayed, I believe, six years  
11:31:04 18 in filing its challenge. So if we apply what  
11:31:09 19 happened on the front end to --

11:31:11 20 THE COURT: Wait six years?

11:31:14 21 MS. PERALES: I would suggest six  
11:31:18 22 years.

11:31:18 23 THE COURT: That would make my law  
11:31:19 24 clerks happy.

11:31:22 25 MS. PERALES: We're here to serve. I

11:31:27 1 would say that given the motion -- given -- given  
11:31:34 2 events, given that DACA is evolving in this very  
11:31:38 3 moment, whether it's by legislation or proposed  
11:31:43 4 rulemaking -- obviously discussions are occurring  
11:31:45 5 within DHS and possibly the administration about  
11:31:50 6 whatever is going to come next that the six-year  
11:31:54 7 delay by Texas means that the Court ought to give  
11:32:00 8 enough time to have the rulemaking play itself out.

11:32:03 9 We disagree strongly that there's  
11:32:05 10 no possible conceivable rulemaking that could  
11:32:08 11 address the claims in this case. It's just simply  
11:32:11 12 not true. I think Texas was more than happy to see  
11:32:15 13 the prior administration's movement with respect to  
11:32:21 14 changes to DACA.

11:32:22 15 That undercuts the argument that  
11:32:25 16 they're making today. And so we would urge the  
11:32:28 17 Court to allow the rulemaking process to play itself  
11:32:32 18 out. Because as I mentioned earlier, any review of  
11:32:37 19 this Court's decision -- you know, could potentially  
11:32:41 20 could become moot by the time we get to that.

11:32:46 21 THE COURT: Okay.

11:32:49 22 MR. SAXENA: Your Honor, while  
11:32:53 23 counsel's correct that, you know, we have seen  
11:32:56 24 proposed legislation before, I would like to just  
11:33:01 25 focus on the Department of Homeland Security

11:33:03 1 process. That is the order of the process that  
11:33:11 2 regions requires.

11:33:14 3 There's -- there's relief  
11:33:17 4 available, including remand to the agency for  
11:33:20 5 further consideration. DHS is already engaged in  
11:33:25 6 the process as Your Honor noted. Um, that process  
11:33:29 7 can be allowed to play out. We aren't just waiting  
11:33:35 8 now. There already has been a public announcement  
11:33:38 9 that the process has begun.

11:33:43 10 And it is our position that we  
11:33:44 11 should allow that process to play out as the Court  
11:33:48 12 contemplated in *Regents*.

11:33:51 13 THE COURT: Mr. Robins?

11:33:52 14 MR. ROBINS: Very briefly, Your Honor.  
11:33:53 15 First I would note -- if I omitted stating this -- I  
11:33:56 16 would note for Your Honor in response to Texas's  
11:33:59 17 comments that the Department does intend that their  
11:34:03 18 notice of proposed rulemaking would carefully  
11:34:06 19 address the substantive questions as well.

11:34:09 20 THE COURT: How would it do that?

11:34:10 21 MR. ROBINS: I don't know precisely how  
11:34:13 22 it would intend to do that, Your Honor, but my  
11:34:17 23 understanding is that there's room to do so and that  
11:34:20 24 they intend to do that.

11:34:21 25 Let me transition that point to

11:34:23 1 Your Honor's question in terms of the timing if Your  
11:34:28 2 Honor were to continue to wait. I think at least  
11:34:32 3 six months would be appropriate. The reason why  
11:34:37 4 would be is at that point we anticipate there would  
11:34:40 5 be notice of proposed rulemaking out.

11:34:43 6 We would see what's happening with  
11:34:45 7 the legislative efforts, and that seems a perfectly  
11:34:49 8 appropriate time to take measure of where things are  
11:34:52 9 and what further action is required.

11:34:57 10 And so, once that notice of  
11:35:02 11 proposed rulemaking is out, Your Honor would be able  
11:35:05 12 to see what the intended approach to the substantive  
11:35:07 13 questions are.

11:35:08 14 THE COURT: Well, if the -- if Congress  
11:35:12 15 actually acted, it would moot your efforts, too,  
11:35:17 16 depending on how it's raised.

11:35:19 17 MR. ROBINS: It very well may. Not  
11:35:22 18 prepared to say, you know, with any definition the  
11:35:25 19 extent of that. I think there's several --

11:35:27 20 THE COURT: I don't think anybody in  
11:35:28 21 this courtroom's going to bet on what they think  
11:35:31 22 Congress is going to do.

11:35:33 23 MR. ROBINS: But as I come to a close,  
11:35:36 24 Your Honor, let me also just note that if Your Honor  
11:35:38 25 isn't inclined to wait for the legislative process

11:35:41 1 or the rulemaking that at least given there's been  
11:35:45 2 change in administration, the Federal Defendants  
11:35:47 3 would require the opportunity to submit a  
11:35:50 4 supplemental brief that addresses both the  
11:35:53 5 lawfulness of DACA to engage in that discussion, as  
11:35:56 6 well as the appropriate remedy at this point.

11:35:59 7 Because remedy is a key question in  
11:36:02 8 terms of how the Court should approach the reliance  
11:36:07 9 interests of current DACA recipients.

11:36:09 10 THE COURT: Okay. I will give you and  
11:36:11 11 anyone else -- if you want to file something -- but  
11:36:14 12 do it by a week from this Friday. I don't know --  
11:36:22 13 what's that date?

11:36:23 14 THE CASE MANAGER: The 9th.

11:36:25 15 THE COURT: The 9th.

11:36:26 16 MR. ROBINS: Thank you, Your Honor.

11:36:27 17 THE COURT: All right.

11:36:30 18 MR. THOMPSON: Your Honor, may I?

11:36:32 19 Thank you. Just one final point. This new point  
11:36:35 20 about remand without making sure of being under the  
11:36:38 21 APA, there's a raging debate in the D.C. Circuit  
11:36:42 22 about the propriety of that as a remedy, but I don't  
11:36:45 23 think anyone takes the position that that's an  
11:36:48 24 appropriate remedy where the rule is substantively  
11:36:50 25 number lawful.

11:36:51 1 If it were an arbitrary capricious  
11:36:52 2 problem based on poor reasoning or something, like  
11:36:54 3 the Supreme Court said in the *Regents* case, that's  
11:36:56 4 the time when a Court may potentially remand without  
11:36:59 5 vacating.

11:36:59 6 But given the substantive  
11:37:01 7 unlawfulness ruling in this Court, that's not an  
11:37:03 8 option here.

11:37:08 9 THE COURT: I see you grabbing your  
11:37:09 10 mask. That's the COVID equivalent of raising your  
11:37:15 11 hand.

11:37:17 12 MR. SAXENA: Your Honor, I just say we  
11:37:18 13 respectfully disagree. There is still a place for  
11:37:24 14 the -- for the process. DHS can take comment, can  
11:37:30 15 -- do notice and comment on both -- can remedy  
11:37:34 16 procedural defects and address substantive defects  
11:37:37 17 as part of the process.

11:37:38 18 THE COURT: Can they do both? I mean,  
11:37:43 19 could there be a remand and an appeal if I was to  
11:37:54 20 rule in the favor of State of Texas?

11:37:59 21 MR. SAXENA: So to that, Your Honor, I  
11:38:01 22 would just say I think the principle there is that  
11:38:09 23 the relief granted by the Court should be narrowly  
11:38:13 24 tailored to address.

11:38:15 25 And, you know, a vacatur at this



11:38:19 1 point, when the order of the process is already  
11:38:22 2 started and could continue, um, through a remand in  
11:38:26 3 our view it -- it is extra and it's not necessary to  
11:38:32 4 readdress any harm.

11:38:35 5 THE COURT: Okay. All right. Anyone  
11:38:36 6 want to say anything?

11:38:39 7 Mr. Sweeten, Mr. Thompson, welcome  
11:38:42 8 to the party.

11:38:44 9 MR. THOMPSON: Thank you very much,  
11:38:45 10 Your Honor.

11:38:45 11 THE COURT: Thank you. Ya'll stay  
11:38:52 12 safe.

11:38:52 13 (PROCEEDINGS ADJOURNED AT: 11:38 A.M.)

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I hereby certify that pursuant to Title 28,  
Section 753 United States Code, the foregoing is a  
true and correct transcript of the stenographically  
reported proceedings in the above matter.

Certified on 04/05/2021.

  
\_\_\_\_\_  
Sean Gumm, RPR, CRR